Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1609

ROBBINS MEN'S & BOYS' WEAR CORP.,
Appellant,

v.

THE CITY OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

APPELLANT'S BRIEF

Opposing Motion to Dismiss Appeal

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July 18, 1975

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IN THE

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OCTOBER TERM, 1974

ROBBINS MEN'S & BOYS' WEAR CORP.,
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v.

THE CITY OF NEW YORK,
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On Appeal from the Court of Appeals of the State of New York

APPELLANT'S BRIEF

Opposing Motion to Dismiss Appeal

Pursuant to this Court's Rule 16(4), Appellant submits this brief in opposition to the Motion to Dismiss, dated July 8, 1975, submitted by Appellee, The City of New York, and in support of Appellant's Jurisdictional Statement dated June 19, 1975.

The City's Motion to Dismiss, pursuant to Rule 16(1)(b), has been "made on the ground that the appeal does not present a substantial federal question, and that the judgment rests on an adequate non-federal basis."

Addenda: The New York Court of Appeals' memorandum decision on March 24, 1975, dismissing Robbins' appeal, has now been reported at 36 N.Y.2d 806.

Inadvertently omitted from the Jurisdictional Statement, and included in Appendix C hereto, are Robbins' Notice of

Appeal dated and served June 3, 1975, and filed June 9, 1975, and the New York Court of Appeals' memorandum decision on May 8, 1975, denying reargument of the City's motion to dismiss Robbins' appeal.

A. Substantiality of the Federal Questions Presented:

On this appeal, § B15-37.0(b) of the Administrative Code of the City of New York is challenged as repugnant to the Due Process and Equal Protection provisions of the Fourteenth Amendment. The City's Motion to Dismiss virtually concedes that the statute fixes an unfair and unreasonable occupational rent for the former tenant on the condemnation site. The City's argument is confession and avoidance: As to *Due Process,* Robbins had an administrative escape from an unfair and unreasonable occupational rent; as to *Equal Protection,* the discrimination against Robbins as a former tenant, in contrast to a former owner, was unavoidable under the statutory formula, and *therefore* "reasonable".

1. *Due Process:* The City says (at page 15):

> "Cognizant that the rent prevailing at title-vesting may not be fair or reasonable in every case, the City's rules provide for relief therefrom. . . ."

(a) The City does *not* argue primary jurisdiction in the administrative agency because the administrative proceedings and remedies *never* determine rent as a matter of "fairness" or "reasonableness". The only remedy is "hardship adjustment". Robbins' Jurisdictional Statement was intended to meticulously distinguish the City's "hardship adjustment" by *compassion* from an objective market-value fair rent by *right* in any forum. That remains the Due-Process question presented. The City has not even addressed the question.

(b) The City offers a "sleeping giant" theory—that the City always had the power to unilaterally fix post-condemnation occupational rent, though it often chose not to use the power; § B15-37.0(b) was a mere codification of existing law, not a change or new law. The City says (at page 13):

> ". . . In fact, even prior to the 1962 amendment of § B15-37.0(b), the condemnor uniformly fixed rent for an occupant's continued use of the property. . . ."

The City relies on lower court cases and a supposititious distinction between a court's fixing "rent" and a court's fixing "damages for rent arrears".

The City's interpretation of New York law and Robbins' interpretation cannot be reconciled. The appellate courts below wrote no opinions offering enlightenment. This Court is not the place to attempt such reconciliation.

Let this suffice: There is no legislative history of the 1962 enactment of the City's § B15-37.0(b). In 1965, the substance of § B15-37.0(b) was added to § 127 of the State's Public Housing Law.[1] The legislative history consists of a Memorandum from the City's Legislative Representative in Albany.[2] In 1965, the City represented to the State Legislature that the existing case-law in New York was "inadequate" and "deficient", and that amendment of § 127 was "necessary". The City's Memorandum of 1965 read:

> ". . . The present law is inadequate, however, in that there is no specific provision for 1) fixing rent in the absence of an agreement. . . .
>
> "This bill would cure these deficiencies. . . .
>
> "This bill is patterned upon the provisions contained in Section B15-37.0. . . . However, this bill

1. N. Y. Public Housing Law (44A McKinney's) § 127, amended L. 1965, c. 467.

2. Memorandum of Legislative Representative of City of New York, McKinney's Session Laws of 1965, at 2067-8.

> is necessary because the applicability [of] § B15-37.0 to the [Housing] Authority has been questioned as a result of a lower court decision. . . ."

The "lower court decision" was either *Knowles*[3] or *Philmo Garage*[4]—both of which had denied the City's power to unilaterally fix post-condemnation occupational rent.

Now the City tells this Court that § B15-37.0(b) of the Administrative Code and § 127 of the Public Housing Law were *not* necessary—that the old case-law was adequate for a public land-owner to unilaterally fix occupational rent.

Nevertheless, let the City's argument prevail (*arguendo*). That relates to the City's powers under State law. The issue here is federal Due Process, not State ultra vires. Assume (*arguendo*) that a *private* land-owner has the powers under New York land-law which the City claims. The Questions Presented remain unchanged: Does federal Due Process limit those powers when asserted by a *public* land-owner? Does § B15-37.0(b)—whether restatement or revision—violate federal Due Process by fixing an unfair and unreasonable occupational rent on City-owned realty?

(c) With respect to retroactive rent adjustment and administrative remedies, the City (at pages 6 and 15) speaks of Robbins' experience in another court in 1966 with a different City agency (Department of Real Estate) on another condemnation site.[5] There, as here, the City brought a non-payment summary proceeding, and Robbins challenged the statutory rent under § B15-37.0(b). While

3. New York City Housing Authority v. Knowles, 200 Misc. 156, 103 N.Y.S.2d 270 (Mun. Ct., Bx., 1951).

4. New York City Housing Authority v. Philmo Garage Corp., 187 Misc. 413, 63 N.Y.S.2d 236 (App. T., 1st Dept., 1946).

5. City of New York, Dept. of Real Estate, Landlord-Petitioner, v. H.D.R. Corp., Tenant-Respondent, Civil Ct., N.Y. County #L&T-22055/1966. (H.D.R. Corp. is a wholly-owned subsidiary of Robbins.)

that case was pending, Robbins negotiated with the City and submitted income evidence and rent appraisals. Ultimately, Robbins' rent was adjusted, retroactive to title-vesting. That came by settlement in court, not by administrative hardship adjustment. Judge Fink's order of May 19, 1966, disposing of the case, reads:

> "The above entitled proceeding is settled during trial with aid of court as per stipulation on record."

The rest is outside this record and beyond judicial notice.

That case proves this—and this only: The Commissioner has the *power* to break his own rules against retroactive rent adjustment. But the occupant has *no right* to such retroactive rent adjustment in administrative proceedings. The question presented remains: Does Robbins have a *right* to a fair occupational rent from the date of condemnation?

2. *Equal Protection*: The City virtually concedes that the statute, § B15-37.0, discriminates against former tenants: While former owners pay "reasonable value" under § B15-37.0(c), former tenants pay an unfair and unreasonable statutory rent under § B15-37.0(b). The City claims that the classification has a "reasonable basis" and that the discrimination does not violate Equal Protection.

The City says (at page 11):

> "It is not irrational to continue the rent in effect at title-vesting and to expedite relocation by paying the costs and expenses thereof—rather than open the door to prolonged delay of public projects at hoped for bargain rentals, tax exemption, or both. . . ."

The Federal Relocation Act—which the City professes to follow—speaks of "a uniform policy for the fair and equitable treatment of persons displaced" by condemna-

tion.[6] Both former owners and former tenants receive the same relocation benefits from the City. Both occupy City-owned realty on a temporary basis incident to relocation. The only difference in treatment is the occupational rent.

What the City is saying is that former tenants—but not former owners—"hope for bargain rentals, tax exemption, or both", and therefore would delay public projects. Under § B15-37.0, that applies to residential occupants as well as commercial occupants. Since most condemnations in New York are incident to "slum clearance" (as here), the unfair rent strikes minority occupants of old stores and tenements. Yet, it is the former owner, not the former tenant, who receives the bargain rental, doubly limited by "reasonable value" of use and occupancy and by interest-value of his fee-award.

The City is talking about possession, not rent. To dispossess, the City can either petition in holdover summary proceedings or apply for a writ of assistance in the condemnation court. Of course, the courts—not the City—control *legal* dispossess. But an unfair statutory rent, subject to adjustment only by administrative discretion, gives the City an *economic* tool or weapon for dispossess—not controlled by the courts. Under § B15-37.0, that weapon is used only against former tenants. The City says that § B15-37.0 was so designed. There is no statutory statement of legislative purpose or intent, and no statutory history. The only legislative objective of § B15-37.0 cited by the City is to fix an unfair rent as an economic weapon for dispossess.

Notwithstanding the City's arguments, a "reasonable basis" for constitutionality is not an abstraction or an exercise in interior logic. A statute must have a valid legislative objective. It used to be common—and legal—for the states to make separate-but-equal classifications, until this Court looked into the *consequences* of such classifications and struck them down when discriminatory.

6. Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894 (1970), 42 U.S.C. Ch. 61, § 4621 (quoted at page 9 of Jurisdictional Statement).

The consequences here are that former tenants pay more rent than former owners for occupying the same City-owned realty. The only legislative objective of an unfair rent, says the City, is economic pressure on tenants alone—not owners—to vacate, without recourse to the courts for legal dispossess. To suppose that former tenants are more greedy or obstructive than former owners, is not a "reasonable basis" for § B15-37.0. It is invidious discrimination. Regardless of bureaucratic economy, the statute, § B15-37.0, must yield—not the Fourteenth Amendment.

B. The Alleged Non-Federal Basis of the Judgment:

The City says (at page 18):

> ". . . [Robbins'] alternative 'proof' that real estate taxes alone equal rental value, was so thoroughly insubstantial, as a matter of law, as to warrant appellate adoption of the rent actually prevailing at title-vesting *independently of statute*, thereby precluding any federal question. [Cases cited.]" (Emphasis in original)

Absent proof of rental value, a court is warranted in fixing occupational rent at the amount reserved in a pre-condemnation lease: So much is conceded by Robbins. But the "proof" here was *not* "that real estate taxes alone equal rental value".

Fair market-value rental involves the hypothetical willing seller and willing buyer of the space—here, for a short or unknown time. The hypothetical tenant cannot operate

normally, and will not invest in fixtures or improvements, for an indefinite time. He is the "short-term occupier"[7] or "temporary occupier".[8]

> ". . . possession will be taken by the condemnor in a limited period of time. . . . Everything else being equal, therefore, it is evident that the fair and reasonable market value of the use of condemned property will be substantially less after condemnation than before. . . ."[9]

The hypothetical landlord is looking to construction and the long-term project. His expenses of removing occupants and carrying vacant property until clearance, are costs of the project. The major carrying cost is real estate taxes. The owner's object is not profit but reducing costs pending construction. The situation is not unique to condemnation; it is common to all construction projects between assemblage and clearance.

Robbins' disinterested expert did *not* testify that "real estate taxes alone equal rental value". In his opinion, fair rental value was $12,000 per year. The owner's taxes for the last tax-year had been $19,500; apportioned at 85% for the space occupied by Robbins, the taxes would have been $16,575. The trial court found fair rental value to be $21,000 per year. The expert's testimony emphasized the landlord's position, and included the following:

> "Q. . . . Tell me what you know the fair rental would be on a month-to-month basis?

7. N.J.S.A. §20:3-19, L. 1971, c.361, §19 (quoted at page 14, note 18, of Jurisdictional Statement).

8. U.S. v. General Motors Corp., 323 U.S. 373, at 382-3 (1945) (quoted at page 30 of Jurisdictional Statement).

9. People [by Mondale] v. Bohnen, 273 Minn. 266, 140 N.W.2d 838, at 841 (1966). Accord: Lowell Housing Authority v. Save-Mor Furniture Stores, 346 Mass. 426, 193 N.E.2d 585, at 588 (1963); Falso Heating & Sheet Metal Co. v. State, 59 Misc.2d 12, at 13, 297 N.Y.S.2d 693 (Ct. Cl., 1967).

"A. I believe about a $1,000.00 a month.

"Q. How do you reach that conclusion?

"A. A lot of facts: Somebody would have to come in there and spend money. . . .

"Q. Do you give any consideration to the real estate tax being paid on the property?

"A. . . . if I was owner of this piece of real estate, if I could get part of the taxes paid on it, evidently there is a new city project going to be built there, I would be glad to take any rental in order to cut down my deficit.

"Q. You would be satisfied as an owner to be able to receive that which you pay for taxes on the property?

"A. I certainly would, and I have done it on many occasions in the City of New York. . . . There are cases where I have taken less, just to get off my expenses. . . .

"Q. Knowing full well this is a month-to-month tenancy, and the tenant could be put out at any moment?

"A. That's the most critical part of it.

"Q. Is it fair to say you base your opinion of the $1,000.00 a month based upon the taxes now being paid on this property, assuming taxes were collected?

"A. That is right." (A-38-40)

Throughout these proceedings, the City has stood on the statutory formula—a matter of law. At the trial, the City asked for an adjournment to offer testimony of its appraiser (A-53-54), then declined to offer any evidence of actual rental value. The Appellate Term reversed, on the law. The trial court's findings of fact have not been disturbed by any appellate court—and could not be disturbed. They are fully supported by the record; and the record is fully consistent with the law.

Conclusion: When the City in its "proprietary" capacity needs a law, the City in its "governmental" capacity can enact that law. If the City needs a state law, the City has its legislative representatives in Albany. The merchant displaced by condemnation has no special-interest lobby or public-interest group to represent him before the legislatures or the courts. He has only the Fourteenth Amendment. There are thousands of cases like this case every year. The cases will multiply as government grows and the "proprietary" and "governmental" blend. Rarely will the occupant of City-owned realty have the means or motivation to "fight City Hall" to this Court. The City will continue to defy the Fourteenth Amendment in reliance on the probabilities against appeal. This is as much a test case as any brought by a public-interest group—more so, for being a real case and controversy.

The statute, §B15-37.0 of the Administrative Code of the City of New York, is repugnant to the Due Process and Equal Protection provisions of the Fourteenth Amendment. The Questions Presented are substantial and require plenary consideration by this Court for their resolution.

Respectfully submitted:

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New York, New York
July 18, 1975

APPENDIX C

STATE OF NEW YORK: COURT OF APPEALS

Mo. No. 357

THE CITY OF NEW YORK,
Respondent,

vs.

ROBBINS MEN'S & BOYS' WEAR CORP.,
Appellant.

Motion for reargument of motion to dismiss the appeal denied with twenty dollars costs.

May 8, 1975

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF QUEENS

Index No. L&T-1867/1972

THE CITY OF NEW YORK,
Appellee (Petititoner),

—against—

ROBBINS MEN'S & BOYS' WEAR CORP.,
Appellant (Respondent).

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that ROBBINS MEN'S & BOYS' WEAR CORP., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final orders and judgments of the Court of Appeals of the State of New York, entered in this proceeding on March 24, 1975 (#202) and May 8, 1975 (#357), dismissing the appeal from the final order and judgment of the Appellate Division of the Supreme Court, Second Department, entered in this proceeding on December 23, 1974.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

New York, New York
June 3, 1975

/s/ MELVIN LLOYD ROBBINS
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To:

Hon. W. Bernard Richland,
Corporation Counsel of
The City of New York, Appellee

Clerk, Civil Court, Queens County